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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTURO MORALES, Petitioner

v.

INDUSTRIAL COMMISSION OF ARIZONA,
HIDRO GAS, and
RELIANCE INSURANCE COMPANY, Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF ARIZONA,
DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Arizona Revised Statute [section] 1061(A) requires that an employee must file a notice of claim for compensation within one year of the date of the injury. Three exceptions excuse a late filing (justifiable reliance, insanity, and incapacity), none of which relate to an employee's failure to receive notice of his right to claim benefits. Unexcused, untimely filing bars an employee's claim.

The question presented is whether the Arizona statute's failure to provide an employee adequate notice of a right to claim compensation benefits before extinguishing such right is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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v.

INDUSTRIAL COMMISSION OF ARIZONA,
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RELIANCE INSURANCE COMPANY, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF ARIZONA,
DIVISION ONE

Arturo Morales respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals, State of Arizona, Division One in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1-24) is unreported. The denial of Petitioner's Petition for Review to the Supreme Court, State of Arizona (App. B, 25) is unreported. The Decision Upon Hearing and

Findings and Award Denying Compensability For Lack of Jurisdiction, by the Administrative Law Judge, Industrial Commission, State of Arizona, (App. C, 26-32), is unreported. The Decision Upon Review Affirming Decision Upon Hearing and Findings and Award Denying Compensability, by the Administrative Law Judge, Industrial Commission, State of Arizona (App. D, 33-35) is unreported.

JURISDICTION

The Court of Appeals, State of Arizona, Division One, entered its Order and Memorandum Decision on May 30, 1995. The Supreme Court, State of Arizona, denied a timely petition for review on November 21, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. [section] 1257(a).

STATUTORY PROVISIONS INVOLVED

Arizona Revised Statute [section] 23-1061(A) provides in relevant part as follows:

. . .[N]o claim for compensation shall be valid or enforceable unless the claim is filed with the commission by the employee. . .in writing within one year after the injury occurred or the right thereto accrued. The time for filing a compensation claim begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that he has sustained a compensable injury. Except as provided in subsection B of this section, neither the commission nor any court shall have jurisdiction to consider a claim which is not timely filed under this subsection, except if the employee or other party entitled to file the claim has delayed in doing so because of justifiable reliance on a material representation by the commission, employer or insurance carrier or if the employee or other party entitled to file the claim is insane or legally incompetent or incapacitated at the time the injury occurs or the right to compensation accrues or during the one-year period thereafter. If the insanity or legal incompetence or incapacity occurs after the one-year period has commenced, the running of the remainder of the one-year period shall be suspended during the period of insanity or legal incompetence or incapacity. If the employee or other party is insane or legally incompetent or incapacitated when the injury occurs or the right to compensation accrues, the one-year period commences to run immediately upon the termination of insanity or legal incompetence or incapacity. The

> commission upon receiving a claim shall give notice to the carrier.

Ariz. Rev. Stat. Ann. [section] 23-1061(A) (1983).

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

U.S. CONST., amend. XIV, [section] 1.

STATEMENT OF THE CASE

This case involves the question of whether, consistent with the Due Process Clause of the Fourteenth Amendment, Arizona can enforce a statute which bars a claimant from recovering worker's compensation benefits for failure to file a notice of claim within a statutorily prescribed period, when the statute fails to provide means to ensure the claimant has received notice of his right to

make such a claim.

I.

FACTS AND ADMINISTRATIVE PROCEEDINGS

A. Background Facts.

On July 18, 1990, Petitioner Arturo Morales, a Mexican citizen, suffered severe and extensive injuries when his truck rolled off the interstate highway near Gila Bend, Arizona. He was hospitalized in Yuma, Arizona for about seven days following the accident. After he was released from the hospital, he returned to Juarez, Mexico, where he lived. He remained immobile for approximately one year following the accident.

His employer was Respondent Hidro Gas. He was working for Hidro Gas when the accident occurred. He had driven to Arizona from Tijuana, Mexico to pick up butane gas from a supplier in Peoria, Arizona, then to return the same day to Tijuana.

Hidro Gas hired Mr. Morales in 1983 to work as a truck driver. After obtaining a Texas driver's license at his employer's direction, for several years he daily drove from Juarez, Mexico to Midland Texas, to pick up gas from a supplier and return to Juarez. Hidro Gas assigned him the daily route from Tijuana to Peoria Arizona in November 1989, which he traveled until the accident.

B. Administrative Proceeding Below.

Hidro Gas did not report the injury to the Arizona Industrial Commission or provide Mr. Morales information about its workers' compensation, although required by statute to do so for an employee's known work-related injury. See Ariz. Rev. Stat. [section 23-908(A), (F)-(G) (1983).

Morales first contacted a lawyer in Juarez for help, and was referred to an attorney in El Paso, Texas. He first filed a

Texas civil suit against Hidro Gas. Morales filed a claim for compensation benefits in Texas in November 1991. On May 5, 1992, Respondent Reliance Insurance Company, Hidro's insurance carrier, controverted the Texas workers' compensation claim, asserting the Morales did not have a Texas claim because he resided in Mexico, was recruited and hired there, and was injured in Arizona. On May 26, 1992, the Texas Workers' Compensation Commission denied the claim.

On November 23, 1992, Morales filed a Worker's Report of Injury for the July 1990 injury with the Arizona Industrial Commission. On April 5, 1993, Reliance denied the claim. Morales thereafter timely requested a hearing. On August 12, 1993, Reliance raised the affirmative defense of an untimely claim.

After the hearing the Administrative Law Judge dismissed Morales's claim, pursuant to

Ariz. Rev. Stat. [section] 23-1061(A), because Morales's claim was filed more than a year after the injury and was otherwise unexcused. Appeals followed.

C. Texas Proceeding.

The Petitioner's Texas claims are not germane to this appeal but a brief summation may be helpful to the Court's understanding of the case. Petitioner appealed the May 26, 1992 denial of his Texas compensation claim, and timely filed suit in a Texas court for de novo review. The Texas trial court granted summary judgment in favor of the carrier (named Planet Insurance Company) on October 26, 1993. On April 6, 1995, the court of appeals reversed and remanded the case, on the grounds that there existed a fact issue as to whether Morales was "hired" in Texas and therefore a "Texas employee" entitled to benefits under the act. The matter is

presently pending.

Petitioner has received no compensation benefits from either Texas or Arizona. He is precluded by both acts from double recovery.

II.

ESTABLISHING THIS COURT'S JURISDICTION OF THE QUESTION PRESENTED BY THIS PETITION

The court of appeals declined to rule on whether the Arizona statute was consistent with the Due Process Clause of the Fourteenth Amendment, on the grounds that the Petitioner failed to comply with the state procedural requirement of first raising the issue during the administrative proceeding. See App. A, pp. 16-19). Accordingly, an important issue raised by this petition is whether the Court has authority to review the Arizona decision. For the reasons stated below, it does.

A. How the Fourteenth Amendment Claim was Presented.

1. To the Administrative Law Judge.

In his Request for Review, the Petitioner specifically drew into question the "full faith and credit clause of the United States Constitution" but did not specify the "Due Process Clause" or the Fourteenth Amendment. The relevant portions are as follows:

> The Applicant alleges that the whole purpose of a statute of limitations is for the purpose of providing notification to the Defendants of an Applicant's contention of an injury.
>
> In the instant case, the Defendants were aware of the Applicant's injuries, and were aware of all of the facts of the accident. It appears that the Administrative Law Judge has made a finding that the Applicant, a citizen of Mexico, must be deprived of his legitimate workers' compensation benefits, because he made a wrong choice of forum.
>
> The statute of limitation and one year statute should have been tolled during the period of time that the Texas workers' compensation claim was being pursued.

> The Applicant maintains that the Administrative Law Judge did not apply the full faith and credit clause of the United States Constitution and give meaning to the Texas statute which compels the tolling of any statute of limitation during the period of time that a claim is being litigated in the wrong jurisdiction. (See attached copy of 16.064 of the Texas civil practice and remedies code).
>
> The Applicant alleges that the Doctrine of Estoppel and the Doctrine of Equity demands that the Defendants not be permitted to raise the "statute of limitations", since the Defendants themselves were fully aware of the facts of the claim, were fully aware that a claim for workers' compensation had been filed in Texas, and were not prejudiced whatsoever by the "late" filing of this claim in the State of Arizona.

See App. E, pp. 37-39.

2. To the Arizona Court of Appeals.

In its Opening Brief to the court of appeals, the Petitioner in its Issues Presented drew into question whether the Arizona's Worker's Compensation Act violated the "Due Process Clause of the United States

Constitution," and in his argument specifically referred to A.R.S. 23-1061(A). The relevant portions are as follows:

ARGUMENT VII

WHETHER SELECTIVE ENFORCEMENT OF THE ARIZONA WORKER'S COMPENSATION ACT VIOLATES ARTICLE XVIII, SECTION 8 OF THE ARIZONA CONSTITUTION, AND THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

An employer's failure to report the injury, as required by the Act, constitutes grounds for tolling the one-year period, or postponing the period in which the claim has "accrued" for purposes of

> determining when the time period for filing the claim begins. Alternatively, if the employer's violation of its duty to report the injury does not have such effect, then A.R.S. [section] 23-1061(A), standing alone, no longer provides the claimant with such reasonable opportunity.
>
> There exists no reasonable means from which Mr. Morales could have reasonably ascertained his right to benefits under Arizona law when, as in this case, his employer's violations of the same Act resulted in his failure to receive notice of any kind from any entity of such right.
>
> . . .
>
> In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for "[a] hearing appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

See App. F, pp. 51-54.

3. How the Claim was Presented to the Arizona Supreme Court.

In his petition for review to the Supreme Court of Arizona, the Petitioner in his Issues Presented for Review and Questions Presented drew into question whether notice requirements "violate the Arizona and United States Constitutions", and in his argument again specifically referenced the "due process clause of the United States Constitution." The Petitioner also raised the decision of the court of appeals to decline to rule as to whether the state statute violated the Due Process Clause. The relevant portions are as follows:

> **B. ISSUES PRESENTED FOR REVIEW**
>
> . . . .
>
> (2) Does the Arizona Worker's Compensation Act's failure to provide sanction for an employer's notice violations in a manner similar to sanctions for employee notice requirements violate the Arizona and United States Constitutions?

(3) Should the Court of Appeals have ruled on other issues raised by the Petitioner on appeal?

. . . .

C. REASONS WHY THIS PETITION SHOULD BE GRANTED

. . . .

4. The Supreme Court's Ruling as to the Constitutionality of A.R.S. [section] 23-1061(A) Should be Modified.

. . . .

(b) Constitutionality of the Arizona Worker's Compensation Act.

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

However, a statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right even though its general validity is beyond question. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Thus, even if [section] 23-1061(A) is considered a reasonable regulation in general application, as applied to Mr. Morales, the one year limitations period, without a tolling provision while the same is pending in a foreign jurisdiction, operates to deprive him of his due process right to a hearing and must therefore be held invalid.

. . . .

In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for [a] hearing appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

D.PRESERVATION OF ISSUES FOR APPEAL.

The Court of Appeals declined to

rule on the following issues presented by the Petitioner:

. . .

5. Whether selective enforcement of the Arizona Worker's Compensation Act violates Article XVIII, Section 8 of the Arizona Constitution, and the due process clause of the United States Constitution.

The Court of Appeals ruled that the Ruth exception was inapplicable with respect to these issues. [Decision, at pp. 8-9.] However, the Ruth exception at a minimum applies to the Petitioner's constitutional claims. See also, Barrio v. San Manuel Division Hospital, 692 P.2d 280 (Ariz. 1984).

Moreover, the exception is particularly applicable "if the issues do not turn on disputed evidence and do not require the court to determine additional facts." Rubens v. Costello, 251 P.2d 306 (Ariz. 1952); and Resolution Trust Corp. v. Foust, 869 P.2d 183 (Ariz. App. Div. 1993).

This is precisely the case presented by this Appeal. The Respondent employer does not contest its failure to comply with the employer notice provisions of the Act. All of the issues presented by the Petitioner turn on the legal significance of the employer's failure to comply with its notice

> requirements. For this reason, and because of the general interest of the State of Arizona in determining the rights of all workers affected by the court's interpretation of the Arizona Workers' Compensation Statute, the Petitioner's issues presented by this appeal should be reviewed and ruled upon.

See App. F, pp. 60-61; 65-71.

B. Why the Court has Jurisdiction over the Question Presented in this Petition.

This Court has jurisdiction to decide whether a federal question has properly been presented for review. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928); Hathorn v. Lovorn, 457 U.S. 255 (1982). Notwithstanding the decision of the court of appeals to decline to rule on the Petitioner's Fourteenth Amendment claim, this Court nevertheless has authority to review the Arizona state court decision for the following reasons:

1) the state procedural rule upon which the court of appeals relied has been

inconsistently applied in the past, particularly with respect to constitutional claims; and

2) the state procedural rule upon which the court of appeals relied, which required Petitioner to first present his Fourteenth Amendment claim to the Administrative Law Judge, serves no legitimate purpose because the ALJ lacked the power to rule on the constitutionality of an Arizona statute.

1. Inconsistent application.

The court of appeals declined to rule on Petitioner's Fourteenth Amendment claim on the grounds that he failed to present such the issue to the ALJ for review. See App. A, pp. 16-18; Stephens v. Industrial Comm'n, 114 Ariz. 92, 95, 559 P.2d 212, 215 (App. 1977).

However, Arizona law provides an exception to this requirement if the question raised on appeal "is one of 'a general public

nature, affecting the interests of the state at large." Ruth v. Industrial Comm'n, 490 P.2d 828, 830 (Ariz. 1971) (quoting South Tucson v. Board of Supervisors of Pima County, 84 P.2d 581, 584 (Ariz. 1938).

In Ruth, the petitioner raised a state constitutional question for the first time in a motion for rehearing to the Court of Appeals. Ruth, supra, 490 P.2d at 830, n. 3. Similarly, in Barrio v. San Manuel Division Hospital for Magma Copper Co., 692 P.2d 280 (Ariz. 1984), the petitioner raised a federal constitutional question for the first time in a motion for rehearing to the Court of Appeals. Barrio, supra, 692 P.2d at 283. In both instances the Arizona Supreme Court addressed the constitutional claims.

The court of appeals declined to follow Ruth. It cited no authority but stated that the Petitioner's Due Process claim was not of

general statewide significance because "[t]he current case will affect few claimants other than Morales" and "[e]xpanding Ruth to every issue of interpretation would create an exception that swallows the rule requiring a party to exhaust remedies before raising an issue on appeal." App. A, p. 19.

This reasoning was faulty. Petitioner's Due Process claims will affect other claimants. However, unlike the plaintiffs in Ruth, claimants similarly situated to Petitioner have no opportunity to present such a claim collectively, because no one can identify or predict those employees who will suffer an work-related injury and not be told of the availability of worker's compensation or otherwise be aware of benefits. See e.g., Thompson v. Industrial Comm'n of Arizona, 772 P.2d 1116, 1118 (Ariz. 1989) (claimant failed to report accident (heart attack) "forthwith"

to employer as required by worker's compensation law because "he did not know he was entitled to worker's compensation").

Moreover, other Arizona courts have ruled that a plaintiff may make a constitutional claim without exhausting administrative remedies on the grounds that such a claim is "jurisdictional". See, e.g., Rouse v. Scottsdale Unified School Dist. No. 48, 752 P.2d 22, 24 (Ariz. Ct. App. 1987).

The decision of the court of appeals to decline to hear Petitioner's Due Process claim and the Arizona Supreme Court's decision to deny Petitioner's petition for review was inconsistent with past rulings and therefore does not provide an adequate and independent state ground in this case. Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Hathorn, supra, 457 U.S. at 263.

2. The procedural rule serves no legitimate purpose.

The Industrial Commission derives its power from statutory enactment, and has no power beyond that which has been granted by statute. Pressley v. Industrial Comm'n, 236 P.2d 1011, 1017 (Ariz. 1951). An administrative agency must function only within the parameters of its statutory grant. Kennecott Copper Corp. v. Industrial Comm'n, 564 P.2d 407 (Ariz. 1977); Gila Valley Block Co., Inc. v. Industrial Comm'n, 585 P.2d 573 (1978).

It is highly questionable whether a legislature could theoretically grant to an administrative agency the power to rule on state constitutional issues without violating federal constitutional separation of powers principles. Here, it is enough to note that the Arizona legislature has not granted such power. Moreover, Arizona courts have held

that the doctrine of exhaustion of administrative remedies should apply only when a claim is cognizable by the administrative agency, and should not be summarily applied where jurisdiction of the agency is contested or the agency's expertise is unnecessary. Campbell v. Chatwin, 428 P.2d 108 (1967); see also Rouse, supra, 752 P.2d at 24. For this reason, requiring Petitioner to raise a federal constitutional claim in a state administrative proceeding before an ALJ who incapable of ruling on the claim serves no legitimate state purpose. For this reason also, the procedural bar the court of appeals relied upon does not constitute an adequate and independent state ground. Michigan v. Tyler, 436 U.S. 499, 511, n.7. (1978).

For these reasons, the Court has jurisdiction over the question presented by the Petitioner.

REASONS FOR GRANTING THE PETITION

I.

THE ARIZONA STATUTE IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT FAILS TO PROVIDE FOR ADEQUATE AND EFFECTIVE NOTICE TO CLAIMANTS OF THEIR RIGHT TO OBTAIN COMPENSATION BENEFITS

In Matthews v. Eldridge, 424 U.S. 319 (1976), the Court explained the method for determining what process is due before a person can be deprived of a protected interest. The Court instructed that three factors must be weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 335. The Matthews v. Eldridge factors have become the standard for determining

whether certain challenged administrative procedures comply with the requirements of due process.

The Arizona Workmen's Compensation Act established a comprehensive system for adjudicating all controversies arising out of an injured workman's claim. See generally Allen v. Industrial Comm'n of Arizona, 733 P.2d 290, 292-95 (Ariz. 1987) (discussing history of the act); Sandoval v. Salt River Project, 517 P.2d 706, 711 (Ariz. Ct. App. 1977). Under the Act, employers complying with the statutory mandate to secure worker's compensation insurance "shall not be liable for damages at common law or by statute . . .for injury or death of an employees wherever occurring." Ariz. Rev. Stat. [section] 23-906(A) (1983). There can be little doubt that the loss of an claimant's compensation benefits constitutes a deprivation for

Fourteenth Amendment purposes, since the act also extinguishes an employee's common law cause of action as well as provide for the administration of compensation benefits. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (intangible property right); Goldberg v. Kelly, 397 U.S. 254 (1969); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981).

In 1980, the Arizona legislature amended A.R.S. [section] 23-1061 by abolishing any equitable "good cause" exceptions to the statutory requirement that injured employees file a compensation claim within one year "after the injury occurred or the right thereto accrued." Failure to file within the prescribed period was excusable only under the enumerated sections of the act. Ariz. Rev. Stat. [section] 23-1061(A) (1983). The Arizona Supreme Court ruled the amendments as

constitutional. Allen v. Industrial Comm'n of Arizona, 733 P.2d 290 (Ariz. 1987).

In a companion case to Allen, the Arizona Supreme Court also reiterated that "the time for filing a workers' compensation claim begins to run when the claimant knew or in the exercise of reasonable diligence should have known of the compensable nature of the injury. Pacific Fruit Express v. Industrial Comm'n of Arizona, 735 P.2d 820, 823 (Ariz. 1987) (emphasis added).

It is this interpretation of the statute that collides with the Fourteenth Amendment: the statute provides that an injured employee's time for filing a claim begins when he knew or should have known of the injury, but fails to account for when the injured employee receives notice of his right to obtain compensation benefits.

In Tulsa Professional Collection Services

v. Pope, 485 U.S. 478, 483 (1988), the Court reiterated the rule set forth in Mullane: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." Tulsa, supra, 45 U.S. at 484, citing Mulllane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Arizona law requires that an employer "inform his insurance carrier and the commission" within 10 days "after receiving notice of an accident." Ariz. Rev. Stat. [section] 23-908(F)-(H) (1983). When the employer complies with this provision, the employee receives actual notice of a right to benefits because the carrier must then either deny the claim within 21 days or make the employee's first installment of an employee's

compensation. See Ariz. Rev. Stat. [section] 23-601(M); 23-1062(B) (1983). Moreover, the Act provides that the Commission "shall send a claim form to the employee" after receiving notification of the injury. See Ariz. Rev. Stat. [section] 23-1061(C) (1983).

However, when the employer fails to file a claim in violation of the statute, no other means exist to ensure that an injured employee has notice of a right to obtain compensation benefits.

In Tulsa, the Court ruled the Fourteenth Amendment required actual notice be provided to known or reasonably ascertainable creditors in the state administration of a "nonclaim" provision of the Oklahoma Probate Code. Tulsa, supra, 485 U.S. 490-91. In the state action presented by this case, it is far easier to identify "known or reasonably ascertainable" claimants because they are by

definition employees whose employers are subscribers to the state compensation insurance plan.

The difficulty lies in identifying employees who have or will suffer work-related injuries. However, rather than construct a statutory scheme of providing notice in a manner "reasonably calculated to apprise interested parties" -- employees -- of their potential or actual right to compensation benefits, the Arizona statutory scheme provides for no such notice at all before a claimant may be barred from seeking compensation benefits. Instead the employee who has "untimely" filed a claim for benefits, is left to fit into one of the enumerated exceptions to "excuse" an untimely filed claim.

This scheme does not meet the fundamental fairness litmus test of the Fourteenth

Amendment. It is worse than Tulsa, and Logan, and Mullane, because the scheme presented here provides for notice at all of a claimant's right to obtain compensation benefits. It assumes that employees know they have such rights, or that employers will recognize all injuries as work-related and timely provide notice to its carrier and to the Industrial Commission.

The Fourteenth Amendment requires more than this. At a minimum, an employer's failure to comply with its statutory requirement to file with Industrial Commission should toll the period in which an injured employee is required to file a notice of claim.

II.

THE QUESTION PRESENTED IS IMPORTANT

Every state has a worker's compensation scheme with notice provisions similar to that of Arizona's. That most employees have actual knowledge of their right to obtain compensation benefits for work-related injuries -- either because they are familiar with the compensatory system or because their employer properly reports an employee injury to its carrier and to the administrative authority -- does not diminish the importance of a state's need to establish a reasonable means to ensure all employees who have work-related injuries receive notice of a right to claim compensation benefits.

The nature of the deprivation involved is particularly acute. As this case aptly illustrates, an employee's claim for compensation benefits, when combined with the

extinguishment of any common law claims against an employer -- often encompasses all other fundamental rights protected by the Constitution.

The inability to recognize similarly situated claimants such as the Petitioner is particularly acute, since an employee not aware or apprised of his right to claim benefits will not likely file a claim within the prescribed period, or at all.

The question presented by this Petition is important The Court should grant the Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James F. Scherr
COUNSEL OF RECORD

Jeffrey B. Pownell
SCHERR & LEGATE, P.C.
1 Texas Tower
109 North Oregon,
Eighth Floor
El Paso, Texas 79901
(915) 544-0100

COUNSEL FOR PETITIONER

Supreme Court, U.S.
FILED
95 1349 FEB 20 1996
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTURO MORALES, Petitioner

v.

INDUSTRIAL COMMISSION OF ARIZONA,
HIDRO GAS, and
RELIANCE INSURANCE COMPANY, Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF ARIZONA,
DIVISION ONE

APPENDIX

---

14 pp

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARTURO MORALES, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, HIDOR GAS, Respondent Employer, RELIANCE INSURANCE COMPANY, Respondent Carrier	)	1 CA-IC 94-0033 DEPARTMENT A ICA CLAIM NO. 92329241562 CARRIER NO. 092-92-52278 O R D E R

The above-mentioned matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the Memorandum

Decision be sent to each party appearing herein or the attorney for such party and to Administrative Law Judge JoAnn C. Gaffaney.

DATED this 30th day of May, 1995.

/s/
Rudolph J. Gerber, Judge

ORDER
1 CA-IC 94-0033

DEPARTMENT A

ICA CLAIM NO. 92329241562
CARRIER NO. 092-92-52278

A true copy of the foregoing
was mailed this April 10, 1995, to:

Mr. David L. Curl,
STUDDARD & MELBY
2501 North Mesa
El Paso, TX 79901
Attorneys for Petitioner

Mr. James F. Scheer,
Mr. Jeffrey B. Pownell
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Co-Counsel for Petitioner

Ms. Anita R. Valainas, Chief Counsel
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Suite 400
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Phoenix, AZ 85007-2934
Attorneys for Respondent

Mr. R. Todd Lundmark,
LONG, LUNDMARK & POPPE, P.A.
P O Box 33997
Phoenix, AZ 85067-3397
Attorneys for Respondent Employer and Carrier

GLEN D. CLARK, CLERK
By

/s/
Deputy Clerk

Honorable JoAnn C. Gaffaney
Administrative Law Judge
INDUSTRIAL COMMISSION OF ARIZONA
800 West Washington Street
Phoenix, AZ 85007

Glen D. Clark, Clerk
By

/s/
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARTURO MORALES,	)	
	)	
Petitioner,	)	1 CA-IC 94-0033
	)	
v.	)	DEPARTMENT A
	)	
THE INDUSTRIAL COMMISSION	)	MEMORANDUM
	)	DECISION
OF ARIZONA,	)	(Not for
	)	Publication -
Respondent,	)	Rule 28, Arizona
	)	Rules of Civil
	)	Appellate
	)	Procedure)
HIDRO GAS,	)	
	)	
Respondent Employer,	)	
	)	
RELIANCE INSURANCE COMPANY,	)	
	)	
Respondent Carrier	)	
	)	
	)	

Special Action--Industrial Commission

ICA CLAIM NO. 92329241562

CARRIER NO. 092-92-52278

Administrative Law Judge JoAnn C. Gaffaney

AWARD AFFIRMED

Studdard & Melby
by David L. Curl
Attorneys for Petitioner El Paso, Texas

Scherr & Legate, P.C.
by James F. Scherr
and Jeffrey B. Pownell
Admitted Pro Hac Vice Attorneys
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Anita R. Valainis, Chief Counsel
The Industrial Commission of Arizona
Attorney for Respondent Phoenix

Long, Lundmark & Poppe, P.A.
by R. Todd Lundmark
Attorneys for Respondents Employer
and Carrier Phoenix

G E R B E R, Judge

Arturo Morales (Morales) seeks review of the Arizona Industrial Commission's (Commission) decision that dismissed his workers' compensation claim because of unexcused untimeliness under Arizona Revised Statutes Annotated (A.R.S.) section 23-1061(A) (1995). For reasons that follow, we affirm the decision.

PROCEDURAL AND FACTUAL HISTORY

Morales is a Mexican citizen who resides in Juarez, Mexico. Respondent Employer, Hidro Gas, is a Mexican corporation located in Juarez with an office in El Paso, Texas.

In 1983, Hidro Gas hired Morales in Mexico to work as a driver in Texas.[1] The job required Morales to obtain a Texas driver's license and drive trucks bearing Texas license plates. In November 1989, Hidro Gas assigned him a new route from Tijuana, Mexico to Peoria, Arizona.

On July 18, 1990, while driving to Peoria, Morales lost control of his truck and rolled off the interstate highway near Gila Bend, Arizona. As a result of injuries sustained in the accident, he was hospitalized in Yuma, Arizona for about seven days.[2] He then returned to Mexico, where he received benefits under the Mexican social security

system.

Hidro Gas did not report the injury to the commission or

---

[1] The record is unclear whether Hidro Gas came to Mexico from Texas to recruit Morales or recruited him from Mexico. The record also is unclear whether Morales's initial route originated in Juarez, Mexico or El Paso, Texas.

[2] The record does not reveal whether the attending physicians in the Yuma hospital reported the injury to the Commission. See generally A.R.S. [section] 23-908(A) (Supp. 1994).

[next page]

provide Morales information about its workers' compensation carrier. See generally A.R.S. [sections] 23-908(A),(F)-(G). It also did not report the injury to the Texas Workers' Compensation Commission. See generally Tex. Rev. Civ. Stat. Ann. art. 8307 sec. 7 (West Supp. 1995) (repealed effective Jan. 1, 1991) (current version at Texas Lab. Code Ann.

[section] 409.005 West Supp. 1995).

By October 1991, Morales was represented by a Texas attorney (hereinafter Scherr), who apparently filed a Texas civil suit against Hidro Gas.[3] On November 6, 1991, Morales signed a claim for Texas workers' compensation benefits.[4] On November 9, 1991, he signed a retention agreement with Scherr to represent him in the compensation claim.

On May 5, 1992, Respondent Carrier Reliance Insurance Company (Reliance) controverted the Texas workers' compensation claim, asserting that Morales did not have a Texas claim because he resided in Mexico, was recruited and hired there, and was injured in Arizona. On May 26, 1992, the Texas Workers' Compensation Commission denied the claim for insufficient evidence that Morales's employment brought him within the Texas Workers'

[3] At the hearing, Morales's Arizona counsel stated, "I have a document that's dated October of 1991 which shows there is a lawsuit filed in El Paso . . . Arturo Morales versus Hidro Gas, Juarez. The claim file there is 91-12057, which shows that it was filed on behalf of Mr. Morales by Mr. Scherr."

[4] The record does not reveal when this claim was filed with the Texas Workers' Compensation Commission.

[next page]
Compensation Act.[5]

On November 23, 1993, while represented by Scherr, Morales filed a Worker's Report of Injury for the July 1990 injury with the Commission. Nothing in this claim suggests that he was claiming Texas rather than Arizona workers' compensation benefits. On April 5, 1993, Reliance denied the claim. Morales thereafter timely requested a hearing. By August 10, 1993, Scherr had associated with Arizona counsel to represent Morales before

the Commission. On August 12, 1993, before the first scheduled hearing, Reliance raised the affirmative defense of an untimely claim.

At the ensuing hearing, Morales alone appeared. Before he testified, his attorney responded to the affirmative defense by arguing that:

> [Morales] did not know that he had the industrial accident here in Arizona. He thought it was a Texas, or at least he was informed it was a Texas industrial injury and that was the reason it was not timely filed. It was filed in Texas and was not filed in Arizona until a defense was made that it was not a -- that Texas did not have jurisdiction. It was then filed up here.[6]

---

[5] Morales did not present evidence concerning any appeal to this May 26, 1992 order. Respondents have submitted a July 13, 1992 Summary Judgment Motion in the District Court of El Paso County, Texas, which apparently is a response to Morales's appeal of the May 26, 1992 order in the District Court. The disposition of that appeal, and any further appeal, is not part of the current record.

[6] The Texas claim, however, was filed more than a year after the industrial injury. An

Arizona claim therefore would have been untimely if Morales had filed in Arizona rather than in Texas. See A.R.S. [section] 23-1061(A). The Texas claim may have been timely because under Texas law, the one-year period for filing a claim begins to run only if the employer reports the injury to the Texas Workers' Compensation Commission. See Tex. Rev. Civ. Stat. Ann. art. 8307 sec. 7a (West Supp. 1995) (repealed effective Jan. 1, 1991) (current version at Texas Lab. Code Ann. [section] 409.008 West Supp. **[footnote continues on next page]**

4

[next page]

Morales initially explained that he had delayed filing a workers' compensation claim in Arizona because he was bedridden for a year after the July 18, 1990 injury. He then testified that he did not realize he could file in Arizona until Scherr advised him of this right sometime after the Texas claim was denied. After talking to a Mexican attorney, Morales personally filed the Texas claim.[7] However, he acknowledged that he first met Scherr a few days before filing the claim and that he based his actions on his attorney's

advice. His Arizona attorney confirmed that Scherr had represented Morales in the civil action filed before the November 1991 Texas workers' compensation claim and avowed "that I was told by the secretary of Mr. Scherr that their records indicated that there was mention of representation in March of '91."[8] Finally, Morales acknowledged that neither Hidro Gas nor Reliance ever advised him not to file an Arizona claim.

The Administrative law Judge (ALJ) then issued the award dismissing Morales's claim because of unexcused untimeliness. She

---

1995). In this appeal, Reliance contends that the employer reporting requirement applies only if a claimant is a Texas employee. According to Reliance, because Morales was not a Texas employee, Hidro Gas did not have to report his injury in Texas, and the Texas claim therefore was untimely filed in Texas as well. We have not found Texas case law addressing this issue and also note that Reliance relies on an amended version of the Texas statute that became effective on September 1, 1993. See Texas Lab. Code Ann.

[section] 409.005(f) West Supp. 1995 (creating good cause exception to administrative violation for failing to report injury).

[7] In his deposition, Morales explained that he thought he had a Texas claim because the trucks that he drove had Texas license plates and Hidro Gas had an office in Texas.

[8] Counsel also stated that Morales's sister, who was at the hearing and present when he saw Scherr, confirmed his avowal.

[next page]
found that Morales was hired by Hidro Gas in Mexico, that Morales had sought representation from Scherr as early as March 1991, and that he relied on his attorney's advice in filing the November 6, 1991 Texas workers' compensation claim. She then concluded by stating:

> The evidence clearly establishes that the applicant's claim was filed in Arizona after the one year statute of limitations had run. Although the applicant alleges that he was laid up during that period of time, the evidence establishes that the Arizona claim was not filed until the Texas claim was at issue. Furthermore, the applicant was acting under the advise [sic] of an attorney as early as March,

> 1991, well within the one year filing period. Therefore, the undersigned finds that the applicant has failed to meet his burden of proof to show that he should be excused from the untimely filing of his Arizona claim.

Morales requested review. He argued that because the purpose of a statute of limitations is to provide notice of a "contention of an injury" and the Texas workers' compensation board fully notified Respondents "of the facts of the incident and action," Respondents were equitably estopped to assert the defense of an untimely claim. He also argued that the award penalized him for making a wrong choice of forum, that the limitations period should have been tolled while he pursued the Texas claim, and that the ALJ "did not apply the full faith and credit clause of the United States Constitution and give meaning to the Texas statute which compels the tolling of any statute of limitation during the period of time a claim

is being litigated in the wrong jurisdiction."

After the ALJ affirmed her prior decision without modification, Morales brought this special action. We grant his request for representation by Texas counsel, including Scherr, in

[next page]
this appeal. We have jurisdiction under A.R.S. section 23-943(H) and R.P.S.A. Rule 10 (Supp. 1995).

DISCUSSION

On review, Morales presents eight issues, which we summarize as follows:

> (1) whether Hidro Gas's failure to report the injury to the commission is a material misrepresentation that excuses the late claim under A.R.S. section 23-1061(A);
>
> (2) whether this same failure prevented the claim from accruing or from being "compensable" under section 23-1061(A);
>
> (3) whether Texas law applies to this claim under A.R.S. section 23-904(B);

(4) whether the Texas statute of limitations and tolling provision applies under Brandler v. Manuel Trevizo Hay Co., 154 Ariz. 96, 740 P.2d 958 (App. 1987);

(5) whether Reliance waived the untimely claim defense under section 23-1061(D) by not raising it in Texas;

(6) whether A.R.S. section 12-504(A), Arizona's civil savings statute, applies to Morales's workers' compensation claim;

(7) if Hidro Gas's failure to report the injury does not excuse the late claim, whether 23-1061(A) unconstitutionally deprives Morales of due process of law; and

(8) whether the Full Faith and Credit Clause compels the Commission to apply Texas law to this claim.

Reliance argues that Morales failed to preserve all of these issues for review, and further, that the issues have no merit.

A. Preservation for Appeal

As a general rule, unless a party calls attention to an error on administrative review, appellate review is limited to "(1) those matters which are extant in the record, such as objections to evidence, and (2) the

issue which is fundamental on review, that is, the sufficiency of the evidence to support the decision." Stephens v. Industrial Comm'n, 114 Ariz. 92, 95, 559 P.2d 212, 215 (App. 1977). An exception to this rule applies "if the question [raised for the first time on appeal] is one of 'a general public nature, affecting the interests of the state at large' . . . ." Ruth v. Industrial Comm'n, 107 Ariz. 572, 574, 490 P.2d 828, 830 (1971) (quoting South Tucson v. Board of Supervisors of Pima County, 52 Ariz. 575, 583, 84 P.2d 581, 584 (1938)). Ruth involved a consolidated disposition of eight separate cases that challenged Arizona's lien statute because it did not require a compensation carrier to share the cost of a claimant's third-party action. Id. at 573, 490 P.2d at 829. The supreme court "consider[ed] the question of the constitutionality of a vital provision of the

Workman's Compensation Act an issue of general statewide significance." Id. at 574, 490 P.2d at 830.

In the current case, Morales failed to present to the ALJ most of the issues that he now raises on appellate review: that Hidro Gas or Reliance had made a misrepresentation and that he had relied upon it; that his claim had not accrued; that his claim was not "compensable"; that Reliance had waived the defense of an untimely claim; and that the one-year claim period under A.R.S. section 23-1061(A) denied him due process. Further, he never asserted that the ALJ should have applied A.R.S. section 23-904(B) or A.R.S. section 12-504(A).

In his reply brief, Morales argues that the Ruth exception

[next page]

applies to these issues because they concern

the interpretation of Arizona statutes and the constitutionality of [section] 23-1061(A).

We disagree that the current case is comparable to Ruth. Ruth addressed an issue that affects every workers' compensation claimant who also has a third-party civil remedy. The current case will affect few claimants other than Morales. Further, many cases present an issue of statutory interpretation. Expanding Ruth to every issue of interpretation would create an exception that swallows the rule requiring a party to exhaust administrative remedies before raising an issue on appeal.

We therefore conclude that Morales failed to preserve issues 1,2 and 3 and issues 5, 6 and 7 as summarized previously. We address issues 4 and 8.

B. Merits of Preserved Issues

As to issue 4, Morales asserts that the

ALJ should have applied the Texas limitations period and savings statute to his Arizona workers' compensation claim.[9] To support the applicability of Texas law, he cites Brandler v. Manuel Trevizo Hay Co., 154 Ariz. 96, 740 P.2d 958 (App. 1987).

Brandler is a civil case applying Arizona's two-year statute of limitations to a California workers' compensation claimant's third-party action in Arizona against an Arizona defendant. Id. at 96-101, 740 P.2d at 958-63. This case does not imply that an

---

[9] We note that under Texas law, the civil savings statute does not apply to a Texas workers' compensation claim. See Pan American Fire & Casualty Co. v. Rowlett, 479 S.W.2d 782, 783 (Tex. Ct. App. 1972).

[next page]

Arizona ALJ should apply Texas law to an Arizona workers' compensation claim. To the contrary, the general rule is that the state

in which a claimant claims compensation applies its own law to the claim.[10] See 4 Arthur Larson, The Law of Workmen's Compensation [sections] 84.21, at 16-3, 84.23, 84.24, at 16-13 (1995); cf. Farias v. Mattel, Inc., 153 Ariz. 113, 114-15, 735 P.2d 143, 144-45 (App. 1986) (applying Florida workers' compensation exclusive remedy law to dismiss Arizona civil action against Florida employer) (citing 4 Larson, [section] 88.11 (1986)); Quiles v. Heflin Steel Supply Co., 145 Ariz. 73, 74-79, 699 P.2d 1304, 1305-1310 (App. 1985) (Greer, J., dissenting) (applying California workers' compensation law governing right to third-party claim brought by workers' compensation carrier in Arizona and applying Arizona law governing relation back of claimant's complaint in intervention). We therefore disagree that Arizona case law required the Arizona ALJ to apply Texas law to

Morales's Arizona workers' compensation claim.

---

[10] Arizona is one of only three states with a special statutory provision permitting the forum state to apply sister state law. See 4 Larson, [section] 84.27. The Arizona Supreme Court has interpreted A.R.S. [section] 23-904(B) to apply only if Arizona does not have jurisdiction to apply Arizona law to the claim, i.e., when the claimant was not hired or regularly employed in Arizona or the injury did not occur in Arizona. See Ocean Accident & Guarantee Corp. v. Industrial Comm'n, 32 Ariz. 275, 284-85, 257 P. 644, 647 (1927); accord Collins v. American Buslines, Inc., 79 Ariz. 220, 224, 286 P.2d 214, 217 (1955) (confirming that Arizona has jurisdiction to apply Arizona law to injury occurring in Arizona) (overruling Industrial Comm'n v. Watson Bros. Transp. Co., Inc., 75 Ariz. 357, 363, 256 P. 2d 730, 733 (1953)), overruled on other grounds by 350 U.S. 528 (1956). But cf. Arizona Workers' Compensation Handbook [section] 13.2.3.2 (stating that section 23-904(B) applies to injury occurring in Arizona) (Ray J. Davis et al., eds. 1992).

[next page]

As to issue 8, Morales argues that the Full Faith and Credit Clause compelled the Arizona ALJ to apply the Texas limitations period and savings statute to the Arizona

claim. See generally U.S. Const. art. IV, [section] 1. To the contrary, the constitution does not compel a forum state to apply sister state law so long as the forum state has jurisdiction to apply its own law to the claim. See, e.g., Carroll v. Lanza, 349 U.S. 408 (1955) (concluding that Full Faith and Credit Clause does not require state of injury to apply sister state's law); accord 4 Larson, [sections] 86.00 to 86.35; Restatement (Second) of Conflict of Laws [section] 181 (1971); Arizona Workers' Compensation Handbook, [section] 13.2.2.1. Under this rule, "the test is not whether the interest of the forum state is relatively greater, but only whether it is legitimate and substantial in itself." 4 Larson, [section] 86.35, at 16-61 (footnote omitted).

CONCLUSION

For the foregoing reasons, we affirm the

ALJ's decision that dismissed Morales's Arizona workers' compensation claim for unexcused untimeliness.

/s/
Rudolph J. Gerber, Judge

CONCURRING:

/s/
Sheldon H. Weisberg, Presiding Judge
Department A

/s/
William F. Garbarino, Judge

APPENDIX B

SUPREME COURT
State of Arizona
402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-8395

November 22, 1995
RE: ARTURO MORALES VS. INDUSTRIAL COMMISSION OF ARIZONA/HIDRO GAS et al
Supreme Court No. CV-95-0315-PR
Court of Appeals No. 1 CA-IC 94-0033
Industrial Claim No. 92329241562
Carrier No. 092-92-52278

GREETINGS:
The following action was taken by the Supreme Court of the State of Arizona on November 21, 1995, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED

FURTHER ORDERED: Request for Attorneys' Fees [Morales] = DENIED.

Record returned to Court of Appeals, Division One, Phoenix, this 22nd day of November, 1995.
NOEL K. DESSAINT, Clerk
TO: David L. Curl, Esq., Studdard & Melby
James F. Scherr, Esq. and Jeffrey B. Pownell, Esq., Scherr & Legate, P.C.
Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona
R. Todd Lundmark, Esq., Long, Lundmark & Poppe, P.A.
Glen D. Clark, Clerk, Court of Appeals, Division One
Lexis-Nexis
West Publishing Company

APPENDIX C
BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ARTURO MORALES Applicant, vs. HYDRO GAS Defendant Employer, RELIANCE INSURANCE COMPANY Defendant Insurance Carrier	ICA CLAIM NO. 92329241562 SOCIAL SECURITY #111-00-0001 CARRIER CLAIM NO. 092-92-52278 DATE OF INJURY: 07/18/90 **DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY FOR LACK OF JURISDICTION**

The applicant alleges that he sustained an industrial injury on July 18, 1990. On November 23, 1992, the applicant filed a Workers' Report of Injury with the Industrial Commission of Arizona. On April 5, 1993, the defendant carrier denied the claim. Applicant filed a timely Request for Hearing. Before the hearing, the defendant insurance carrier raised the jurisdictional issue. Formal

hearing was convened on November 15, 1993, in Phoenix, Arizona. The applicant is represented by Mr. Lawrence Nicholls. The defendants are represented by Mr. Todd Lundmark.

The undersigned, having fully considered the file, records and all relevant matters, now enters her FINDINGS AND AWARD as follows:

[next page]
ARTURO MORALES

F I N D I N G S

1. The issue is whether the Industrial Commission has jurisdiction to consider the merits of the applicant's claim since his claim was filed untimely pursuant to the statute of limitations provided in A.R.S. [section] 23-1061 (A). Applicant has the burden of proof as to all the essential elements of the claim. In Re Estate of Bedwell, 104 Ariz. 443, 454 P.2d 985 (1969);

Malinski v. Industrial Commission, 103 Ariz. 213, 439 P.2d 485 (1968).

2. Arizona Revised Statute [section] 23-1061(A) provides:

> . . .[N]o claim for compensation shall be valid or enforceable unless the claim is filed with the commission by the employee. . .in writing within one year after the injury occurred or the right thereto accrued. The time for filing a compensation claim begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that he has sustained a compensable injury. Except as provided in subsection B of this section, neither the commission nor any court shall have jurisdiction to consider a claim which is not timely filed under this subsection, except if the employee or other party entitled to file the claim has delayed in doing so because of justifiable reliance on a material representation by the commission, employer or insurance carrier or if the employee or other party entitled to file the claim is insane or legally incompetent or incapacitated at the time the injury occurs or the right to compensation accrues or during the one-year period thereafter. If the insanity or legal incompetence or incapacity occurs after the one-year period has commenced, the running of the remainder of the one-year period shall be suspended during the period of insanity

or legal incompetence or incapacity. If the employee or other party is insane or legally incompetent or incapacitated when the injury occurs or the right to compensation accrues, the one-year period

commences to run immediately upon the termination of insanity or legal incompetence or incapacity. . .

3. Applicant testified that he was injured while driving a truck for Hydro Gas on July 18, 1990. In 1983, he was hired by Hydro Gas in Juarez, Mexico. According to the applicant, the defendant employer is a Mexican company with offices in El Paso, Texas. Applicant worked for a few years in Texas. However, at the time of the accident, applicant was working in Tijuana, Mexico. He would drive to Peoria, Arizona and then back to Tijuana. The applicant testified that he

had been driving this route daily since November 1989. Applicant testified that he had a home in Juarez, Mexico. The accident occurred in Yuma, Arizona. The applicant was hospitalized for seven days in a Yuma hospital. Thereafter, he was taken to Juarez, Mexico. Applicant testified that he first contacted a lawyer in Juarez, Mexico to help him receive benefits. He was then referred to a lawyer in El Paso, Texas. Applicant filed a Workers' Compensation Claim in Texas on November 6, 1991, upon the advise of his attorney. The claim was denied. The applicant sought representation from Texas counsel as early as March, 1991.

4. The evidence clearly establishes that the applicant's claim was filed in Arizona after the one year statute of limitations had run. Although the applicant alleges that he was laid up during that period

of time, the evidence establishes that the Arizona claim was not filed until the Texas claim was at issue. Furthermore, the applicant was acting under the advise of an attorney as early as

[next page]

March, 1991, well within the one year filing period. Therefore, the undersigned finds that the applicant has failed to meet his burden of proof to show that he should be excused from the untimely filing of his Arizona claim.

A W A R D

1. The applicant's claim is denied for the reason that the Industrial Commission lacks jurisdiction.

- - - - - - - - - - - -

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided by Arizona Revised Statutes, Sec. 23-942 D and 23-943 A and B. Unless such written request is made within the time provided, this Award is final.

By /s/
JOANN C. GAFFANEY
Administrative Law Judge

jw
DATED AND MAILED IN PHOENIX, ARIZONA ON DECEMBER 7, 1993.

APPENDIX D
BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ARTURO MORALES	ICA CLAIM NO. 92329241562
Applicant,	SOCIAL SECURITY #111-00-0001
	CARRIER CLAIM NO. 092-92-52278
	DATE OF INJURY: 07/18/93
vs.	
	DECISION UPON REVIEW AFFIRMING DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY
HIDRO GAS	
Defendant Employer,	
RELIANCE INSURANCE COMPANY	
Defendant Insurance Carrier.	

On December 7, 1993, DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY was issued by the undersigned. On January 6, 1994, REQUEST FOR REVIEW was filed by applicant. On January 21, 1994, counsel for defendants filed RESPONSE TO REQUEST FOR REVIEW.

The undersigned, having fully reconsidered the file, records and all matters

hereto pertaining, now enters her DECISION UPON REVIEW AFFIRMING DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY as follows:

F I N D I N G S

That the DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY entered on December 7, 1993, is fully supported by the evidence and is hereby affirmed.

[next page]

A W A R D

IT IS ORDERED that the DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY entered on December 7, 1993 is affirmed.

- - - - - - - - - - -

NOTICE: Any party dissatisfied with this Decision Upon Review may apply to the Court of Appeals of the State of Arizona, Division One, for a review of the lawfulness of this Decision pursuant to the provisions of Arizona Revised Statutes, Secs. 23-951 A and 12-120.21 B. See also Rules 10, Rules of Procedure for Special Actions, Arizona Revised Statutes, 17A. Unless such application is made within THIRTY (30) DAYS after the mailing hereof, this Decision shall be final. Arizona Revised Statutes, Sec. 23-943 H.

By /s/
JOANN C. GAFFANEY
Administrative Law Judge

jw

DATED AND MAILED IN PHOENIX, ARIZONA ON FEBRUARY 1, 1994.

APPENDIX E

Lawrence P. Nicholls, Esq.
Nicholls & Stillwell
822 E. Osborn, Ste. 120
Phoenix, AZ 85014
Telephone: (602) 234-2123
Fax: (602) 264-9895

Attorney For: Arturo Morales

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ARTURO MORALES, Applicant, HIDRO GAS, Defendant Employer, RELIANCE INSURANCE COMPANY, Defendant Carrier	ICA NO: 92329241562 CLAIM NO: 092-92-52278 DATE OF INJURY: 07/18/93 **REQUEST FOR REVIEW**

COMES NOW, the Applicant, by and through his undersigned attorney and requests the Presiding Administrative Law Judge to review the Decision Upon Hearing and Findings and Award denying compensability issued on December 7, 1993. The Applicant alleges that

the Findings and Award of the Administrative Law Judge is based upon a finding that although the Defendants were fully aware and fully notified of the facts of the incident and action by means of a workers' compensation claim having been filed in Texas, that the Applicant cannot proceed with his claim being filed later in Arizona because of the "statute of limitations".

The Applicant alleges that the whole purpose of a statute of limitations is for the purpose of providing notification to the Defendants of an Applicant's contention of an injury.

In the instant case, the Defendants were aware of the Applicant's injuries, and were aware of all of the facts of the accident. It appears that the Administrative Law Judge has made a finding that the Applicant, a citizen of Mexico, must be deprived of his legitimate

workers' compensation benefits, because he made a wrong choice of forum.

The statute of limitation and one year statute should have been tolled during the period of time that the Texas workers' compensation claim was being pursued.

The Applicant maintains that the Administrative Law Judge did not apply the full faith and credit clause of the United States Constitution and give meaning to the Texas statute which compels the

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tolling of any statute of limitation during the period of time that a claim is being litigated in the wrong jurisdiction. (See attached copy of 16.064 of the Texas civil practice and remedies code).

The Applicant alleges that the Doctrine of Estoppel and the Doctrine of Equity demands that the Defendants not be permitted to raise

the "statute of limitations", since the Defendants themselves were fully aware of the facts of the claim, were fully aware that a claim for workers' compensation had been filed in Texas, and were not prejudiced whatsoever by the "late" filing of this claim in the State of Arizona.

RESPECTFULLY SUBMITTED this 6th day of January, 1994.

BY: /s/_____
Lawrence P. Nicholls
Attorney for the Applicant
722 East Osborn, Ste. 120
Phoenix, AZ 85014

Original of the foregoing
delivered this 6th day of
January 1994 to:

Honorable Eileen Willett
Administrative Law Judge
Industrial Commission
800 W. Washington
Phoenix, AZ 85007

Copy of the foregoing mailed
this 6th day of January, 1994, to
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/s/_____

APPENDIX F

State Bar No. 006640

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

ARTURO MORALES,	)
	)
Petitioner,	)
	)
vs.	)
	)
INDUSTRIAL COMMISSION OF ARIZONA,	)
	)
Respondent,	)
	)
HIDRO GAS,	)
	)
Respondent Employer,	)
	)
RELIANCE INSURANCE COMPANY,	)
	)
Respondent Carrier	)
	)

OPENING BRIEF OF PETITIONER

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STATEMENT OF THE CASE

On July 18, 1990, Arturo Morales sustained an industrial injury within the state of Arizona. On November 23, 1992, Mr. Morales filed a Workers' Report of Injury with the Industrial Commission of Arizona. On April 5, 1993, the Respondent Carrier, Reliance Insurance Company, denied the claim. Mr. Morales filed a timely Request for Hearing. Before the hearing, the carrier raised the jurisdictional issue.

Hearing was convened on November 15, 1993 in Phoenix, Arizona. On December 7, 1993, the Administrative Law Judge, Honorable Joann C. Gaffney, rendered her Decision Upon Hearing and Findings and Award Denying Compensability, in which Judge Gaffney denied compensability for lack of jurisdiction (See Exhibit A, attached hereto).

On January 6, 1994, Mr. Morales filed a

Request for Review (See Exhibit B, attached hereto). On January 21, 1994, the Defendant Employer Hidro Gas Juarez, S.A. and Defendant Carrier Reliance Insurance Company filed their Response to Request for Review (See Exhibit C, attached hereto). On February 1, 1994, Judge Gaffney rendered her Decision Upon Review, affirming the Decision upon Hearing (See Exhibit D, attached hereto). This appeal follows.

This Court has jurisdiction to hear this matter pursuant to A.R.S. section 23-951 and Rule 10 of the Rules of Procedure for Special Actions.

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STATEMENT OF FACTS

On July 18, 1990, Arturo Morales, while in the course and scope of his employment as a truck driver with Hidro Gas Juarez S.A., was involved in a vehicular accident on the

Interstate Highway near Gila Bend, Arizona. [R.T., p. 9:19-20.]. Mr. Morales suffered severe and extensive injuries as a result of the accident, including injuries to his knee, hip, waist, ribs, shoulder, and neck. [R.T., p. 10:19-21.] He remained in an Arizona hospital for approximately seven days following the accident, and remained immobile for approximately one year following the accident. [R.T., p. 12:12-16.]

At the time of the accident, Mr. Morales was a resident of Juarez, Chihuahua, Mexico and a citizen of the Republic of Mexico. [R.T. 11:22-25.] Mr. Morales was hired in 1983 by his employer, Hidro Gas Juarez, to work in Texas. [R.T., p. 8:13-21.] Hidro Gas Juarez maintained an office in El Paso, Texas. [R.T., p. 8:22-9:8.] Hidro Gas Juarez recruited Mr. Morales from Texas, for work in Texas. [R.T., p. 8:20-9:4.] Mr. Morales

worked in Texas for Hidro Gas Juarez for between five and six years. [R.T., p. 19:19-21.]

Mr. Morales obtained a Texas driver's license at the direction of Hidro Gas Juarez, in order to work for them. [R.T., p. 15:17-17-20.] The trucks Mr. Morales drove for Hidro Gas Juarez had Texas license plates. [R.T., p. 17:19-21.] His employer also maintained offices in El Paso, Texas. [R.T., p. 17:22-24.]

Hidro Gas Juarez maintains no office in Arizona. [R.T., p.

[next page]
14:14-16.] Mr. Morales had driven to Arizona only to pick up butane gas from AmeriGas Refinery, a supplier in Peoria, Arizona, and return with the butane gas to Tijuana, Mexico. [R.T., p. 10:7-10; 14:21-15:1.]

Mr. Morales's employer, Hidro Gas, did

not report the injury to the Arizona Industrial Commission. Indeed, Hidro Gas to this day has yet to file any written notice of the injury to the Commission.

Hidro Gas also never reported the injury to its carrier, Reliance Insurance Company. Hidro Gas also never provided Mr. Morales with notice of its carrier or policy number.

On November 6, 1991, Mr. Morales timely filed a notice of claim for worker's compensation benefits in Texas. Mr. Morales subsequently filed suit against his employer's carrier, (named Planet Insurance in the Texas proceeding), appealing the award of the Texas Workers' Compensation Commission, seeking benefits pursuant to the Texas Worker's Compensation Act, in cause number 92-7126, such case falling in the 41st Judicial District, El Paso County, Texas. By order signed January 25, 1993, the case was

consolidated into Cause No. 91-12057.

The Texas trial court subsequently granted summary judgment in favor of the carrier, on the grounds that the Texas Worker's Compensation Act failed to provide the Texas court with jurisdiction to adjudicate Mr. Morales's claim, because the injury occurred outside Texas and Mr. Morales was not a Texas resident. Mr. Morales has appealed the ruling. Such appeal is presently

[next page]
pending as No. 08-94-00053-CV, in the Court of Appeals for the Eighth Court of Appeals District of Texas at El Paso, styled Arturo Morales, Appellant v. Hidro Gas Juarez and Planet Insurance Company, Appellees.

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ISSUES PRESENTED

I. WHETHER THE EMPLOYER'S FAILURE TO REPORT THE ACCIDENT TO ITS CARRIER AND THE COMMISSION IN VIOLATION OF A.R.S. [section] 23-908(E) and 23-908(F) CONSTITUTES A MATERIAL MISREPRESENTATION, THEREBY TOLLING THE STATUTE OF LIMITATIONS PURSUANT TO A.R.S. [section] 23-1061(A)

OR

II. ALTERNATIVELY, WHETHER, SINCE THE EMPLOYER FAILED TO REPORT THE ACCIDENT TO THE COMMISSION IN VIOLATION OF A.R.S [section] 23-908(E), MR. MORALES'S CLAIM WAS "COMPENSABLE" OR THE CLAIM "ACCRUED" UNDER ARIZONA LAW ONLY WHEN THE EMPLOYER REPORTS THE INJURY IN ACCORDANCE WITH A.R.S. [section] 23-908(E) and 23-908(F).

III. WHETHER THE ADMINISTRATIVE LAW JUDGE SHOULD HAVE APPLIED TEXAS LAW TO MR. MORALES'S CLAIM, PURSUANT TO A.R.S. [section] 23-904(B)

IV. WHETHER THE ADMINISTRATIVE LAW JUDGE SHOULD HAVE APPLIED THE TEXAS STATUTE OF LIMITATIONS AND THE TEXAS TOLLING PROVISION TO MR. MORALES'S CLAIM, IN ACCORDANCE WITH THE BRANDLER DECISION

V. WHETHER THE CARRIER'S DEFENSE OF STATUTE OF LIMITATIONS WAS WAIVED BY THE CARRIER'S FAILURE TO RAISE SUCH DEFENSE AT THE FIRST HEARING IN TEXAS, AS REQUIRED BY A.R.S. [section] 23-1061(D)

VI. WHETHER MR. MORALES 'S CLAIM WAS TIMELY COMMENCED BY VIRTUE OF THE ARIZONA SAVINGS STATUTE (A.R.S. [section] 12-504(A)

VII. WHETHER SELECTIVE ENFORCEMENT OF THE ARIZONA WORKER'S COMPENSATION ACT VIOLATES ARTICLE XVIII, SECTION 8 OF THE ARIZONA CONSTITUTION, AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

VIII. WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION MANDATES THE APPLICATION OF THE TEXAS TOLLING PROVISION.

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STANDARD OF REVIEW

The issues presented by this appeal are issues of law reviewable de novo by this Court. Arizona Dep't of Public Safety v. Industrial Comm'n, 170 Ariz. 275, 823 P.2d 1283 (Ct. App. 1991); Anton v. Industrial

Commission, 141 Ariz. 566, 688 P.2d 192 (App. 1984). Moreover, in accordance with the constitutional and statutory mandates of the State of Arizona, this Court should liberally construe the Workers' Compensation Act in favor of the worker to effectuate its purpose of protecting its beneficiaries and compensating valid claims. Fullen v. Industrial Comm'n, 122 Ariz. 425, 595 P.2d 657 (1979); Pascucci v. Industrial Comm'n, 126 Ariz. 442, 444, 616 P.2d 902, 904 (Ct.App. 1980).

[page 21 of Petitioner's Opening Brief]

ARGUMENT VII

WHETHER SELECTIVE ENFORCEMENT OF THE ARIZONA WORKER'S COMPENSATION ACT VIOLATES ARTICLE XVIII, SECTION 8 OF THE ARIZONA CONSTITUTION, AND THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

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An employer's failure to report the

injury, as required by the Act, constitutes grounds for tolling the one-year period, or postponing the period in which the claim has "accrued" for purposes of determining when the time period for filing the claim begins. Alternatively, if the employer's violation of its duty to report the injury does not have such effect, then A.R.S. [section] 23-1061(A), standing alone, no longer provides the claimant with such reasonable opportunity.

There exists no reasonable means from which Mr. Morales could have reasonably ascertained his right to benefits under Arizona law when, as in this case, his employer's violations of the same Act resulted in his failure to receive notice of any kind from any entity of such right.

If the Arizona Worker's Compensation Act fails to provide sanctions for an employer's notice violations of the provisions of the Act in a

manner consistent with sanctions for an employee's notice violations of the Act, the Act then fails maintain its status as a "reasonable regulation" of an employee's constitutionally protected right to a "just and humane" system of collecting benefits for employment related injuries. Accordingly, such inconsistent application of violations of the Act renders A.R.S. [section 23-1061(A) violative of the Arizona Constitution and accordingly unenforceable.

In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury

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deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for "[a] hearing

appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

ARGUMENT VIII

WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION MANDATES THE APPLICATION OF THE TEXAS TOLLING PROVISION.

The United States Supreme Court has held that a forum state may apply its own statute of limitations to its judicial proceedings, consistent with the full faith and credit clause of the United States Constitution. Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

However, unlike the statute of limitations, where Arizona has expressed its legislative intent, Arizona law is silent with respect to the effect of an employer's failure to report his employee's injury. Conversely,

Texas law has expressly set forth the effects of an employer's failure to report, as set forth in Tex. Rev. Civ. Stat. Art. 8307, [section] 7a (Vernon 1986) (see infra, p. 12).

This case involves the denial of a claim to an employee hired and working in Texas for a Texas based company insured in Texas, licensed in Texas, qualified to do business in Texas and travel in Texas, driving a Texas registered vehicle on an interstate highway,

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who timely filed a claim for compensation benefits in Texas. When, as in this case, Arizona law is silent with respect to the effect of an employer's statutory notice violations, and Texas law has expressly set forth the effect for the same violation, the full faith and credit clause of the United States Constitution compels Arizona courts to recognize the Texas tolling provision as

binding and similarly recognize Mr. Morales's Arizona claim as timely filed.

APPENDIX G

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARTURO MORALES, Petitioner, vs. INDUSTRIAL COMMISSION OF ARIZONA, Respondent, HIDRO GAS, Defendant Employer, RELIANCE INSURANCE COMPANY, Respondent Carrier	X X X X X X X X X X X X X X X	I CA-IC ICA CLAIM NO. 92329241562 CARRIER CLAIM NO. 092-92-52278 **PETITION FOR REVIEW**

ARTURO MORALES petitions for review pursuant to Rule 23, ARCAP.

A. SYNOPSIS OF THE COURT OF APPEALS DECISION

1. STATEMENT OF THE CASE

On July 18, 1990, Arturo Morales sustained an industrial injury within the State of Arizona. On November 23, 1992, Mr. Morales filed a Workers' Report of Injury with the Industrial Commission of Arizona. On April 5, 1993, the Respondent Carrier,

[next page]
Reliance Insurance Company, denied the claim. Mr. Morales filed a timely Request for Hearing. Before the hearing, the carrier raised the jurisdictional issue.

Hearing was convened on November 15, 1993 in Phoenix, Arizona. On December 7, 1993, the Administrative Law Judge, Honorable Joanna C. Gaffaney, rendered her Decision Upon Hearing and Finding and Award Denying Compensability, in which Judge Gaffney denied compensability for lack of jurisdiction.

On January 6, 1994, Mr. Morales filed a Request for Review On January 21, 1994, the Defendant Employer, Hidro Gas Juarez, S.A. and Defendant Carrier, Reliance Insurance Company, filed their Response to Request for Review. On February 1, 1994, Judge Gaffney rendered her Decision Upon Review, affirming the Decision Upon Hearing. The Petitioner appealed.

On May 30, 1995, the Arizona Court of Appeals, Division One, issued its Memorandum Decision affirming the decision of the Administrative Law Judge. A copy of the Memorandum Decision is attached to this Petition for Review.

2. THE COURT OF APPEALS DECISION

The Court of Appeals held that the Arizona limitations applied to Petitioner's claim for worker's compensation benefits. (Decision (Appendix "A"), at pp. 9-10). The

Court of Appeals also ruled that the Full Faith and Credit clause of the United States Constitution did not compel the Arizona A.L.J. to apply the Texas limitations period and savings statute to the Arizona claim. (Decision, at p. 11). The Court of Appeals did not rule on the

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Petitioner's rehearing issues, on the grounds that such issues were not preserved for relief on appeal. (Decision, at pp. 7-9).

B. ISSUES PRESENTED FOR REVIEW

(1) Should the Arizona ALJ apply the Texas limitations (and tolling) period to Mr. Morales' claim for Arizona worker's compensation benefits?

(2) Does the Arizona Worker's Compensation Act's failure to provide sanction for an employer's notice violations in a manner similar to sanctions for employee

notice requirements violate the Arizona and United States Constitutions?

(3) Should the Court of Appeals have ruled on other issues raised by the Petitioner on appeal?

C. FACTS MATERIAL TO THE ISSUES

On July 18, 1990, Arturo Morales, while in the course and scope of his employment as a truck driver with Hidro Gas Juarez S.A. was involved in a vehicular accident on the Interstate Highway near Gila Bend, Arizona. [R.T. (Appendix "B"), p. 9:10-20.] Mr. Morales suffered severe and extensive injuries as a result of the accident, including injuries to his knee, hip, waist, ribs, shoulder, and neck. [R.T., p. 10:19-21.] He remained in an Arizona hospital for approximately seven days following the accident, and remained immobile for approximately one year following the accident.

[R.T., p. 12:12-16.]

At the time of the accident, Mr. Morales was a resident of Juarez, Chihuahua, Mexico and a citizen of the Republic of Mexico. [R.T. 11:22-25.] Mr. Morales was hired in 1983 by his employer,

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Hidro Gas Juarez, to work in Texas. [R.T., p. 8:13-21.] Hidro Gas Juarez maintained an office in El Paso, Texas. Hidro Gas Juarez recruited Mr. Morales from Texas, for work in Texas. [R.T., p. 8:29-9:4.] Mr. Morales worked in Texas for Hidro Gas Juarez for between five and six years. [R.T., p. 19:19-21.]

Mr. Morales obtained a Texas driver's license at the direction of Hidro Gas Juarez in order to work for them. [r.T., p. 15:17-20.] The trucks Mr. Morales drove for Hidro Gas Juarez had Texas license plates. [R.T.

17:19-21.] His employer also maintained offices in El Paso, Texas. [R.T., p. 17:22-24.]

Hidro Gas Juarez maintains no office in Arizona. [R.T., p. 14:14-16.] Mr. Morales had driven to Arizona only to pick up butane gas from AmeriGas Refinery, a supplier in Peoria, Arizona, and return with the butane gas to Tijuana, Mexico. [R.T., p. 10:7-10; 14:21-15:1.]

Mr. Morales' employer, Hidro Gas, did not report the injury to the Arizona Industrial Commission. Indeed, Hidro Gas **to this day** has yet to file any written notice of the injury to the Commission.

Hidro Gas also never reported the injury to its carrier, Reliance Insurance Company. Hidro Gas also never provided Mr. Morales with notice of existence of worker's compensation insurance, the identify of its carrier or

policy number.

On November 6, 1991, Mr. Morales timely filed a notice of claim for worker's compensation benefits in Texas. Mr. Morales subsequently filed suit against his employer's carrier (named Planet Insurance in the Texas proceeding), appealing the award of

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the Texas Worker's Compensation Commission, seeking benefits pursuant to the Texas Worker's Compensation Act, in Cause Number 92-7126, such case falling in the 41st Judicial District, El Paso County, Texas. By order signed January 25, 1993, the case was consolidated into Cause No. 91-12057.

The Texas trial court subsequently granted summary judgment in favor of the carrier, on the grounds that the Texas Worker's Compensation Act failed to provide the Texas court with jurisdiction to

adjudicate Mr. Morales' claim because the injury occurred outside Texas and Mr. Morales was not a Texas resident. Mr. Morales has appealed the ruling. Such appeal is presently pending as No. 08-94-00053-CV in the Court of Appeals for the Eight Court of Appeals District of Texas at El Paso, styled Arturo Morales, Appellant, v. Hidro Gas Juarez and Planet Insurance Company, Appellees.

C.REASONS WHY THIS PETITION SHOULD BE GRANTED

1. **Important Issues of Law Have Been Incorrectly Decided -- The Court of Appeals' Decision is Contrary to Court Opinions in the Brandler Decision and the Quiles Decision.**

2. **Public Policy Considerations Require That Arizona Recognize a Worker's Compliance with Notice Requirements in the State of the Employer's Principal Place of Business as Proper Notice for Obtaining Compensation Benefits Under Arizona Law.**

3. **The Case Concerns Important Questions That Should be Settled for Future Cases.**

4. **The Supreme Court's Ruling as to the Constitutionality of A.R.S. [section] 23-1061(A) Should be Modified.**

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(b) Constitutionality of the Arizona Worker's Compensation Act.

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

However, a statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right even though its general

validity is beyond question. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Thus, even if [section] 23-1061

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(A) is considered a reasonable regulation in general application, as applied to Mr. Morales, the one year limitations period, without a tolling provision while the same is pending in a foreign jurisdiction, operates to deprive him of his due process right to a hearing and must therefore be held invalid.

Moreover, if the Arizona Worker's Compensation Act fails to provide sanctions for an employer's notice violations of the provisions of the Act in a manner consistent with sanctions for an employee's notice violations of the Act, the Act then fails to maintain its status as a "reasonable regulation" of an employee's constitutionally protected right to a "just and humane" system

of collecting benefits for employment related injuries. Accordingly, such inconsistent application of violations of the Act renders A.R.S. [section] 23-1061(A) violative of the Arizona Constitution and accordingly unenforceable.

In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for [a] hearing appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

D. PRESERVATION OF ISSUES FOR APPEAL.

The Court of Appeals declined to rule on the following issues

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presented by the Petitioner:

1. Whether the employer's failure to report the accident to its carrier and the commission in violation of A.R.S. [section] 23-908(E) and 23-908(F) constitutes a material misrepresentation, thereby tolling the statute of limitations pursuant to A.R.S. [section] 23-1061(A); or

   Alternatively, whether, since the employer failed to report the accident to the Commission in violation of A.R.S. [section] 23-908(E), Mr. Morales' claim was "compensable" or the claim "accrued" under Arizona law only when the employer reports the injury in accordance with A.R.S. [section] 23-908(E) and 23-908(F);

2. Whether the Administrative Law Judge should have applied Texas law to Mr. Morales' claim, pursuant to A.R.S. [section] 23-904(B);

3. Whether the carrier's defense of statute of limitations was waived by the carrier's failure to raise such defense at the first hearing in Texas, as required by A.R.S. [section] 23-1061(D);

4. Whether Mr. Morales' claim was timely commenced by virtue of the Arizona Savings Statute (A.R.S. [section] 12-504(A); and

5. Whether selective enforcement of the Arizona Worker's Compensation Act violates Article XVIII, Section 8 of the Arizona Constitution, and the due process clause of the United States Constitution.

The Court of Appeals ruled that the Ruth exception was inapplicable with respect to these issues. [Decision, at pp. 8-9.] However, the Ruth exception at a minimum applies to the Petitioner's constitutional claims. See also, Barrio v. San Manuel Division Hospital, 692 P.2d 280 (Ariz. 1984).

Moreover, the exception is particularly applicable "if the issues do not turn on disputed evidence and do not require the court to determine additional facts." Rubens v. Costello, 251 P.2d 306 (Ariz. 1952); and Resolution Trust Corp. v. Foust, 869 P.2d 183 (Ariz. App. Div. 1993).

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This is precisely the case presented by this Appeal. The Respondent employer does not contest its failure to comply with the employer notice provisions of the Act. All of the issues presented by the Petitioner turn on the legal significance of the employer's failure to comply with its notice requirements. For this reason, and because of the general interest of the State of Arizona in determining the rights of all workers affected by the court's interpretation of the Arizona Workers' Compensation Statute, the Petitioner's issues presented by this appeal should be reviewed and ruled upon.

Finally, Morales requests that this Court exercise its discretionary power (Rule 23(i)(3), ARCAP) and decide <u>all</u> of the remaining issues in this case which have been fully preserved and briefed.

Morales requests an award of his costs

and attorney's fees incurred in this appeal, pursuant to Rule 21(c), ARCAP, and A.R.S. [section] 12-341.01.

[next page]

Respectfully submitted this 28 day of June, 1995.

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(3)

No. 95-1349

Supreme Court, U.S.
FILED
APR 29 1996
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ARTURO MORALES, Petitioner
v.
INDUSTRIAL COMMISSION OF ARIZONA,
HIDRO GAS,
RELIANCE INSURANCE COMPANY,
Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Arizona

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Arizona legislature's 1980 amendment of Arizona Revised Statute (A.R.S.) § 1061(A), strictly limiting the circumstances under which the untimeliness of a workers' compensation claim may be excused, impermissibly denied procedural due process to the petitioner, Arturo Morales.

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BRIEF IN OPPOSITION

The respondent employer and insurance carrier, Hidro Gas and Reliance Insurance Company respectively, on their own behalf and that of the Industrial Commission of Arizona, respectfully request this Court to deny the petition for writ of certiorari filed by Arturo Morales, the petitioner.

Relevant Statutes

In addition to the constitutional and statutory provisions quoted by the petitioner, the following subsections of A.R.S. § 23-908 are relevant:

> F. Within ten days after receiving notice of an accident, the employer shall inform his insurance carrier and the commission on such forms and in such manner as may be prescribed by the commission.
>
> . . . .
>
> H. Any person failing or refusing to comply with the provisions of this section is guilty of a petty offense.

A.R.S. § 23-908(F) & (H) (1995).

Statement of the Case

I. Factual Background

Morales was injured on July 18, 1990 when he lost control of the truck and semi-trailer he was driving and rolled off the interstate highway near Gila Bend, Arizona. He was en route from Tijuana, Mexico to Peoria, Arizona, where he was to pick up a load of propane fuel and return it to Tijuana for the respondent employer, Hidro Gas.

Hidro Gas is a Mexican corporation with an office in El Paso, Texas. Morales himself is a Mexican citizen and a resident of Juarez in the state of Chihuahua. Although it is undisputed that he was hired by Hidro Gas in 1983, there is contradictory evidence as to whether he was hired in Texas or Mexico. In either case, he initially worked out of Texas. From November 1989 on, however, his regular, daily route had been between Tijuana and Peoria.

So severe were Morales' injuries that he was hospitalized in Yuma for a week following the accident. Contrary to his present claim that he "remained immobile" for the following year, Petition at 5, he returned to Juarez upon his release and thereafter consulted an attorney.

At the Industrial Commission of Arizona's hearing, Morales's local attorney stated that the records of the Texas attorney, James Scherr, contained "mention of representation in March of '91." See Petition, App. A, at

12, 13 n.8. The Commission accordingly found that Morales "was acting under the advice of an attorney as early as March, 1991, well within the one year filing period." Petition, App. C, at 31.

Whether the advising attorney was Scherr is a matter of dispute. What is not disputed is that Morales formally retained Scherr on October 3, 1991 and that this attorney represented Morales first in a common-law negligence claim against his employer. Scherr then represented Morales in a Texas workers' compensation claim. Although Morales did not retain Scherr for the latter purpose until November 8, 1991, the Texas claim he filed two days earlier was on the advice of the attorney.

The claim was denied in May 1992 on the ground that Morales was not an employee within the Texas Act. The denial is still on appeal in the courts of that state. In the meantime, on November 23, 1992, two years and four months after the industrial injury, Morales filed a workers' compensation claim in Arizona.[1] In the meantime, too, he began receiving benefits under Mexico's social security system.

[1] His filing on this date belies his later claim that he was unable to recognize the compensable character of his injury under Arizona law until December 1992, when the carrier first contended the claim should have been brought in Arizona.

II. Procedural Background

Morales' Arizona claim was denied on April 5, 1993. He protested the denial, the respondents raised the untimeliness of the claim as an affirmative defense, and the case proceeded to hearing on November 15, 1993. The resulting award found that the claim was indeed untimely and that the untimeliness was not excused under A.R.S. § 23-1061(A). See Petition, App. C.

Morales protested the Commission's award on two grounds unrelated to the pending petition. See Petition, App. E. His only constitutional argument was that the full faith and credit clause required Arizona to apply Texas's saving statute to his claim. Id. at 38. The Commission's finding that he had acted with the advice of counsel since at least March 1991 went unchallenged.

Once the Commission affirmed its award, Morales appealed to the Arizona Court of Appeals. Here, for the first time, he touched on the issue now before this Court. He argued, without citation to any specific authority, that to enforce the one-year limit on an employee's time to file a claim "without imposing a similar penalty on an employer who violates the Act by failing to report the injury" is to deprive the employee of an opportunity for a hearing, in violation of the due process clause. See Petition, App. F, at 53-54.[2]

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[2] Morales separately argued that the statute of limitations for filing his Arizona claim should have been tolled until his employer

The court of appeals declined to consider Morales' due process argument, as well as five other new issues he raised, because they had not been preserved for review. See Petition, App. A, at 18-19. It also rejected his claim that the due process argument should be considered under an exception recognized by the Arizona court for questions of "a general public nature, affecting the interests of the state at large." Id. at 17-19 (quoting Ruth v. Industrial Commission, 490 P.2d 828, 830 (Ariz. 1971)). The court held, to the contrary, that the "current case will affect few claimants other than Morales." Id. at 19.

In petitioning the Arizona Supreme Court for review, Morales invoked the due process clause to argue variously that Arizona's Workers' Compensation Act was facially invalid and that it was invalid as applied. See Petition, App. G, at 60, 66-67. In the name of due process, he also invoked Arizona's saving statute. Id. at 67 ("the one-year limitations period, without a tolling [sic] provision while the same is pending in a foreign jurisdiction, operates to deprive him of his due process right to a hearing"). He finally also asserted the argument now before this Court, that the "dissimilar" penalties imposed on employees and employers who violate the Act constitutes a due process violation. Id. at 68.

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filed the required report with the state's Industrial Commission. This argument was based not on the due-process clause, however, but on the asserted requirement that Arizona apply Texas law to his claim. See id. at 48-49.

On November 22, 1995 the Arizona Supreme Court denied Morales's petition for review. The lower court's holding that Morales had not preserved the due process issue for review thereby became final.

Reasons to Deny the Writ

I. Introduction

The foregoing procedural history establishes that Morales's due process claim is not properly before this Court. His new arguments, addressed in Section II below, compel no different conclusion.

Even if jurisdiction were not at issue, however, the petitioner's other arguments defy both established federal and state law and basic principles of equity.

II. This Court lacks jurisdiction over Morales' due process claim because the Arizona court's refusal to consider it was based on adequate and independent state grounds.

The general rule in Arizona, as elsewhere, is that an issue not raised before the Industrial Commission is not subject to appellate review. See Stephens v. Industrial Commission, 559 P.2d 212, 214 (Ariz. Ct. App. 1979). Arizona makes an exception for issues of "a general public nature, affecting the interests of the state at large." Ruth, 490 P.2d at 830. Under both the rule and its exception, the court of appeals declined to consider Morales' claim that the Workers' Compensation Act deprived him of

notice and an opportunity to be heard.

Contrary to Morales's assertion, the Arizona court has applied the general rule consistently. This is evident even from the cases he cites for a contrary proposition. Ruth itself adjudicated eight consolidated claims challenging Arizona's lien statute on the ground that it did not require the compensation carrier to share the cost of the claimant's third-party action. As such, it "addressed an issue that affects every workers' compensation claimant who also has a third-party civil remedy." Petition, App. A, at 19.

The other two cases on which Morales relies involved hearings before administrative bodies other than the Industrial Commission. In Rouse v. Scottsdale Unified School District, 752 P.2d 22 (Ariz. Ct. App. 1987), rev. denied (1988), a terminated teacher asserted for the first time on appeal that his due process rights were violated where his review hearing was conducted by the same school board that had terminated him. The court of appeals determined that this issue went to the "competency of the board itself." Id. at 24. As such, it was "akin to a jurisdictional question," which may be raised at any point in a proceeding. See id. For this reason alone, the court held that Rouse's failure to raise the issue before the board did not preclude judicial review. Id.

In Campbell v. Chatwin, 428 P.2d 108 (Ariz. 1967), the real parties in interest were three persons whose driver's licenses or vehicular registrations had been

suspended. All had appealed to the superior court without first requesting a hearing before the Arizona Highway Department. Acknowledging the general rule that a party must exhaust administrative remedies, the court declared the rule inapplicable in the limited circumstance "where, by the terms or implications of a statute authorizing the administrative remedy, the remedy is permissive only." Id. at 114. Despite its dicta, echoed in Rouse, that the exhaustion rule should not be "summarily applied where jurisdiction of the agency is being contested," id., the Campbell court went on to find the rule applicable here. These cases, in summary, do not establish any unreasoned inconsistency in the court's application of the rule.

Morales's further assertion that the Industrial Commission's fact-finding expertise could serve no legitimate function in the adjudication of his constitutional claim is similarly mistaken. Admittedly the Commission could not declare the statute governing a claim's timeliness unconstitutional. But it could have made findings relevant to, if not determinative of, the more concrete issue of notice. Had the issue been properly raised, the record might now include, for example, Morales's own testimony on when he first consulted an attorney, who that attorney was, and whether he was licensed to practice in any of the United States. As the record stands, only the averments of local counsel address any of these matters.

The Arizona Court of Appeals accordingly did not err in holding that Morales had not preserved his due

process claim for review. Neither did it err in the conclusion that Morales's case would affect few other claimants. Indeed it is as rare as legal malpractice itself that a worker who has been injured on the job will -- on the advice of an attorney -- bring a tort action against his employer, then file a workers' compensation claim not only belatedly but in the wrong state. Nothing about this case raises any question of "a general public nature, affecting the interests of the state at large."

II. Arizona's statute governing the timeliness of claims does not implicate the due process clause either in what the statute provides or in what it omits.

Prior to its amendment in 1980, Arizona's statute establishing a one-year limitation for the filing of compensation claims had been liberally construed by the court. See Allen v. Industrial Commission, 733 P.2d 290, 294-95 (Ariz. 1987) (reviewing the history and constitutionality of A.R.S. § 23-1061(A)). Based on the statutory provision that the failure to timely file must be raised at the first hearing, A.R.S. § 23-1061(D), the court construed the one-year filing requirement as an affirmative defense. Allen, 733 P.2d at 294-95. As such, an employer could be equitably estopped from raising the defense "where he had, by his own conduct, caused the employee to forebear [sic] filing a claim." Id. at 295 (quoting Van Horn v. Industrial Commission, 527 P.2d 282, 284 (Ariz. 1974) ("Van Horn II")).

In 1980 the legislature amended A.R.S. § 23-1061 "expressly to deprive the Commission and the courts of jurisdiction to excuse late filings except on certain enumerated grounds."[3] Id. The Allen court declared the amendment constitutional on two grounds: first, because the legislature may reasonably regulate the time in which a compensation claim may be filed and, second, because the amended statute still provided claimants with "a reasonable opportunity to file a claim." Id. at 297. The amendment therefore did not violate the state constitutional mandate for a "just and humane compensation law." Id. (citing Ariz. Const. art. XVIII, § 8).

Since 1968 a separate section of Arizona's Act has required employers to report industrial accidents to the Commission and has provided penalties for their failure to do so. A.R.S. § 23-908(F) & (H) (quoted supra at p. 1). The relevant subsections have been unchanged since 1968. A.R.S. § 23-908, Hist. & Stat. Notes (1995). Arguably, the employer's failure to file the required report might have estopped it from raising the statute of limitations as a defense prior to the 1980 amendment of A.R.S. § 23-1061(A).

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[3] Although Morales's pleadings in state court sought to bring him within the enumerated exceptions, his petition to this Court makes no such claim.

The evolution of section 23-1061(A) has inversely reflected the evolution of the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901 et seq. (hereafter "LHWCA"). As originally enacted, the LHWCA provided:

> The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death . . . .

33 U.S.C.A. § 913(a), quoted in Ayers v. Parker, 15 F. Supp. 447, 448 (D. Md. 1936). Like Arizona's present A.R.S. § 23-1061, the federal statute went on to enumerate specific exceptions to the one-year filing requirement. See id. § 913(c) & (d), quoted in Ayers, 15 F. Supp. at 448-49. A separate section required the employer to report the injury to the Secretary within ten days of its occurrence. 33 U.S.C.A. § 930(a), cited in Ayers, 15 F. Supp. at 452.

In Ayers, a widow's death claim was rejected on the ground that it was not filed within one year of the date of death and that it did not fall within any of the statutory exceptions. The widow's argument strikingly parallels Morales'. She argued that the employer should be estopped from raising the claim's untimeliness as a defense

> because of its own failure to comply with section 30 of the act (33 U.S.C.A. § 930) which requires all employers to make a detailed report to the commission and Deputy Commissioner within ten days of the date of any injury to or death of employees, subjecting the employer to a civil penalty not exceeding $500 for every failure or refusal so to do . . . .

Ayers, 15 F. Supp. at 452.

The court unequivocally declared the widow's argument meritless. See id. Conceding that the employer should have reported the injury or death if it was within the Act, "nevertheless section 30 is entirely separate and distinct from section 13. Id. (emphasis added). The court affirmed the Deputy Commissioner's rejection of the widow's claim.

In Young v. Hoage, 90 F.2d 395 (D.C. Cir. 1937), the court of appeals similarly considered whether a widow was entitled to death benefits under the LHWCA where she, too, had filed no claim within one year. Reviewing the case law of states with provisions similar to section 913, the court concluded:

> [W]here a statute gives a right of the character in question -- a right unknown to the common law -- and limits the time within which an action shall be brought to

> assert it, the limitation defines and controls the right.

Id. at 400 (citing William Danzer & Co. v. Gulf R. Co., 268 U.S. 633 (1925)). Again, the court affirmed the rejection of the widow's claim.

In 1938, the LHWCA was amended to include a provision tolling the limitations period of section 913(a) until the employer filed the report required by section 930(a). 33 U.S.C.A. § 930(f) & Hist. Note (1986). In February 1938, less than a year before the amendment became effective, a longshoreman named Steffen sustained an injury compensable under the LHWCA. Associated Indemnity Corp. v. Pillsbury, 147 F.2d 546, 546 (9th Cir. 1945). Returning to work after only a few days, Steffen filed no claim for compensation at the time. His employer, who knew about the injury, filed no report. By August 1938 Steffen had become completely disabled from his injury. Still he filed no claim until January 1941.

In arguing that Steffen's claim was barred under section 913(a), the employer asserted that the amendment tolling the limitations period could not be given retroactive effect. Id. Such effect would be barred if the amendment were deemed substantive. See, e.g., Pierce v. Hobart Corp., 939 F.2d 1305 (5th Cir. 1991). The Ninth Circuit declared, however, that the amendment "related purely to a matter of administration." 147 F.2d at 546-47 (Congress apparently intended to give employers an additional incentive for obeying the statutory mandate). It held that

Steffen's claim was not time-barred.

This line of cases establishes what a survey of the states' current workers' compensation statutes confirms: that whether or not the limitations period for filing a claim is tolled until the employer files its report, the statutory scheme does not implicate any substantive rights, much less the constitutional right to notice and a hearing.

Indeed, it is well established that

> [u]nder some statutes, but not others, the failure of the employer to file the required report of the accident deprives the employer of the defense of limitations or extends the time within which the employee may file his claim.

100 C.J.S. Workmen's Compensation § 475, at 390 (1958). Where the statute does not so provide, however, "the employer's mere failure to report the accident . . . as required does not toll" the limitations period. Id. at 391. The penalty against the employer under such statutes is whatever the legislature prescribes. See, e.g., Poythress v. J.P. Stevens & Co., 283 S.E.2d 573, 579 (1981), rev. denied, (1982).

Although the statutes of many states are or have been in the latter group with Arizona's, see 100 C.J.S. Workmen's Compensation § 475, at 391. n. 49 (1958 and Supp. 1995); DeRousse v. PPG Industries, 598 S.W.2d

106 (Mo. 1980), the petitioner cites not a single authority even suggesting that such statutes may violate due process. Because federal courts presume that state legislatures act constitutionally, Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362 ((6th Cir. 1984), and because the burden of demonstrating unconstitutionality is on the party assailing a law, United States v. Conner, 715 F. Supp. 1327 (W.D.N.C. 1989), Morales's challenge to A.R.S. § 23-1061(A) must fail.

III. Morales's petition derogates the principles of due process that underlie the case law construing the LHWCA as well as the challenged provisions of Arizona's Workers' Compensation Act.

The amount of process due under the fifth and fourteenth amendments is "minimal." Thomas v. Devries, 834 F. Supp. 398 (M.D. Ga. 1993) aff'd, (11th Cir. 36 F.3d 95). Due process is "not a technical abstraction unrelated to time, place, and circumstances, but rather an embodiment of fundamental principles of fair play and justice." Erwin v. City of Santa Fe, 599, 855 P.2d 1060, 1063 (N.M. Ct. App. 1993) (citing Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981)). As such, due process dictates "no single model of procedural fairness, let alone a particular form of procedure." Kremer v. Chemical Construction Corp., 456 U.S. 461, 483 (1982).

In the case of statutes, notice is constructively given and due process satisfied by mere publication. Breath v. Cronvich, 729 F.2d 1006, 1011 (5th Cir.) cert denied, 469

U.S. 934 (1984). Therefore, even though the 1980 amendment of A.R.S. § 23-1061(A) eliminated all meritorious excuses for untimely filing except those specifically enumerated therein, Morales cannot be heard to complain that he was thereby denied notice of the one-year filing requirement. When a legislature enacts "general legislation eliminating a statutory right, or affecting the 'benefits and burdens of economic life,'" the legislative process itself provides all the process that is due. Ponce Paramedical College v. United States Department of Education, 858 F. Supp. 303, 314 (D.P.R. 1994) (citations omitted).

Ignorance of the statute, therefore, cannot form the basis of a due process challenge. Gaston v. Taylor, 946 F.2d 340, 342 (4th Cir. 1991). Where, as in Arizona, the Workers' Compensation Act allows claimants a full year to file their claims, Morales' failure to avail himself of the statutory procedure, whether or not he had actual knowledge of it, does not constitute a violation of due process. See Bonilla v. Rodriguez, 635 F. Supp. 148, 153 (D.P.R. 1986).

In the instant case, moreover, Morales was either represented by or acting under the advice of an attorney well within the one-year limitations period. Whether or not the attorney had actual knowledge of workers' compensation law in general and Arizona's law in particular, such knowledge is imputed to him or her. As Morales's agent, the attorney's knowledge is in turn imputed to Morales. Between the two of them, then, they

knew both that Morales had sustained an industrial injury and that he had one year from the date of injury to file an Arizona claim.

> [D]ue process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.

In re Medaglia, 52 F.3d 451, 455 (2d Cir. 1995). Neither is due process offended by not providing personal notice to a person who already has constructive knowledge of the matters of which they might be notified. See Moreau v. Federal Energy Regulatory Commission, 982 F.2d 556, 569 (D.C. Cir. 1993).

Whatever knowledge Morales claims would have come to him through the employer's statutorily required report, therefore, is knowledge he already had. He had knowledge of the event giving rise to his claim. He had knowledge of Arizona's Act through its enactment and publication. He had knowledge of its specific filing requirement. His due process rights were therefore not violated by the absence of a statutory penalty against the employer that would toll the limitations period until he received personal notice. See Tulsa Professional Collections Services v. Pope, 485 U.S. 478 (1988) (due process does not require that potential plaintiffs be given notice of the impending expiration of the limitations period).

IV. Morales's petition derogates the separation of powers doctrine that underlies the case law construing the LHWCA as well as the challenged provisions of Arizona's Act.

The flexibility the due process clause affords legislatures in fashioning procedures is reinforced by the separation of powers doctrine. Thus the Ninth Circuit declared:

> [W]hether legislation meets its objectives is never a basis for [the court's] striking it down. Congress is not required to enact perfect legislation.

Das v. Department of Health & Human Services, 17 F.3d 1250, 1256 (9th Cir. 1994) (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)). Declining to find a specific statute violative of due process, the Seventh Circuit stated that "[d]ue process just requires procedures that will usually lead to correct outcomes." Del's Big Saver Foods v. Carpenter Cook, Inc., 795 F.2d 1344, 1350 (7th Cir. 1986). The First Circuit stated similarly that the Constitution simply "does not require every procedural protection that might help." Newman v. Burgin, 930 F.2d 955, 961 (1st Cir. 1991).

Together these principles refute Morales's charge that Arizona's Workers' Compensation Act deprived him of due process. It was entirely within the Arizona legislature's prerogative to limit the sanctions for an

employer's violation of the reporting requirement as it did. See A.R.S. § 908(H) (violating employer is guilty of a petty offense). That tolling the limitations period for filing a claim might have given employers "an additional incentive for obeying the statutory mandate," see Associated Indemnity Corp., 147 F.2d at 547, is constitutionally immaterial. The due process clause does not require every procedural protection that might possibly help.

Federal and state courts have regularly applied these principles to due process challenges to statutes of limitations. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), this Court stated unequivocally that not every civil litigant is entitled to a hearing on the merits in every case:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, [including] statutes of limitations . . . . And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural . . . rule.

Id. at 437 (emphasis in original) (citations omitted). See also Chase Securities Corp. v. Donaldson, 325 U.S. 304, 313-16 (1945) (statutes of limitations are by definition arbitrary; they come into law not through the judicial process but through legislation; they represent a public policy about the privilege to litigate).

Where, in a workers' compensation act, the state legislature has chosen not to toll the statute of limitations until an employer files the required report, the legislative prerogative has been uniformly upheld. Thus, for example, in DeRousse, the injured employee argued that the eight-year delay in filing his compensation claim should be excused because of the employer's failure to report the injury as required by statute. 598 S.W.2d at 107. Michigan's Act, like Arizona's, required the employee's claim to be filed within one year of the injury unless one of the several specified exceptions applied. See id. The Act also required the employer to file its report within ten days after acquiring knowledge of the injury, and it specified the penalty for violation of the requirement as

> a fine of not less than fifty nor more than five hundred dollars, or . . . imprisonment in the county jail for not less than one week nor more than one year, or both the fine and imprisonment.

Id. at 107-08 (quoting Mo. Rev. Stat. § 287.380.4 (1978)).

The Supreme Court of Missouri soundly rejected the employee's argument. Reasoning that the employer's failure to report the accident "in no way prevents the injured employee from filing a claim," id. at 110, the court held:

> Had the legislature intended that the employer's neglect or failure to file a report of injury should toll the limitations period, it "would have adopted the simple, certain, and easy method of directly incorporating such provision." The legislature's omission of tolling from the sanctions authorized for the employer's failure to comply with [Mo. Rev. Stat.] § 287.380 indicates that tolling is not an appropriate sanction for such failure, absent fraud. "Statutes of limitations are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within [an] exception."
>
> . . . .
>
> . . . "[C]ourts are not at liberty to write into [the Workmen's Compensation Law] under the guise of construction, provisions which the legislature did not see fit to insert."

Id. at 111-13 (citations omitted) (interpolations in original).

Under similar facts the Supreme Court of Indiana refused to "substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives." Bunker v. National Gypsum Co., 441 N.E.2d 8, 11 (Ind. 1982) cert. dismissed, 460 U.S. 1076

(1983). The court declared that legislative statutes of limitations, like other legislation, "carry a general presumption of constitutionality":

> A statute of limitations will comport with due process so long as it provides a reasonable time for the bringing of an action. . . . "In respect to substantive rights, conferred by law, or acquired by contract, there is no doubt of constitutional protection without modification or change. It is otherwise with a mere remedy. A remedy is nothing more than the means provided by law for the enforcement of rights, and is not of itself a right . . . . [A]s pertaining to a mere remedy, there exists no doubt of legislative power to make such changes therein as to it seems fit, if in doing so it preserves or provides a reasonable means and opportunity for full enjoyment of the right." The legislature has the sole duty and responsibility to determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice.

Id. at 12 (citations omitted).

Morales does not contend that the limitations period established by A.R.S. § 23-1061(A) is in itself

insufficient. Rather he contends that the legislature erred in not providing an additional exception to its running, where the employer does not file the report required by A.R.S. § 908(F). As the above-cited cases suggest, Morales' claim should be addressed not to the court but to the legislature. The former may not constitutionally "second-guess" the latter, charged as the legislature is with the "heavy responsibility of regulating the social obligations that exist between the employee, the employer, and the public." Desselle v. Liberty Mutual Insurance Co., 482 So. 2d 1009, 1012 (La. Ct. App. 1986).

V. The untimeliness of Morales's claim is causally unrelated to any provisions of or omissions in Arizona's Act or to his employer's failure to comply with the Act's reporting requirement.

Morales's failure to file his Arizona claim until two years and four months after his industrial accident cannot be attributed either to his employer's violation of A.R.S. § 23-908(F) or to the absence of a provision tolling the limitations period until the employer files the report required by that section. Morales's failure is attributable to entirely unrelated causes.

Despite the severity of his industrial injuries, Morales managed to consult an attorney within eight months of their occurrence. Clearly, he considered the compensability of his injuries at that time. In fact, the consultation led to the retention of counsel, the filing of a negligence action against his employer, and later the

filing of a workers' compensation claim in Texas.

That Morales and his attorney misperceived the nature of their remedy and chose a wrong forum for their belated industrial claim was entirely their own doing. So, too, was their very belated recognition that the claim should have been filed in Arizona. See supra note 1 and accompanying text. It was these actions, rather than any shortcomings on the part of the Arizona legislature or Morales's employer, that caused his claim to be untimely.

Confronted with similar facts in Eaton v. Bath Iron Works, 502 A.2d 1040 (Me. 1986), the Supreme Judicial Court of Maine reached precisely the same conclusion. Two and a half years elapsed there between the time of the employee's industrial injury and the time he filed his claim. Although the employer had received timely notice of the injury, it waited until the employee filed his claim before filing the employer's report required by the Maine Act.

Like Morales, the employee argued that if the employer had timely filed its report,

> the notification mechanism . . . would have been triggered, and he would have been informed about the . . . statute of limitations. Inasmuch as his failure to file a claim within the statute of limitations was caused by the inactivity of the employer, [the employee] argues that [it] should be

equitably estopped from using this defense.

Id. at 1042. The court rejected the employee's argument. It held it "incumbent on the employee to establish a causal link" between the employer's failure and his own delay. Id. at 1043. In the absence of such evidence the court found the doctrine of equitable estoppel inapplicable and the employee's claim time-barred. See id.

Even if Morales had carried his burden of proving Arizona's statutory scheme unconstitutional, therefore, his petition should not be granted. The record is devoid of any evidence that the statutory scheme, rather than the pursuit of mistaken remedies, caused his claim to be filed untimely.

Conclusion

The petition for certiorari should be denied. The Arizona Court of Appeals' decision and the Arizona Supreme Court's refusal to review it are fully in accord with the decisions of both federal and state courts.

Respectfully submitted,

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